Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 10-71
Petition for Rulemaking to Amend	)	
the Commission's Rules Governing	)	
Retransmission Consent	)	

COMMENTS IN RESPONSE TO PETITION FOR RULEMAKING

OF

CBS CORPORATION
FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION STATIONS, INC.
NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO.
THE WALT DISNEY COMPANY
UNIVISION COMMUNICATIONS INC.

Dated: May 18, 2010

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SUMMARY

The Broadcast Networks hereby respectfully submit their initial views in response to the Commission's public notice seeking comment about the petition for rulemaking filed by several multichannel video programming distributors ("MVPDs") and their supporters. In the *Petition*, the MVPDs ask the government to protect them against having to compete in a free marketplace. Even though they acknowledge that broadcasters provide some of the most popular and compelling content carried in their channel line-ups, the MVPDs seek to avoid a very simple marketplace reality – emerging competitive forces are now compelling them to pay fair market value for this programming, nearly 20 years after Congress expressly provided for such marketplace negotiations.

As a result, the Petitioners urge the FCC to engage in an extrajudicial reformation of the retransmission consent process. The *Petition*, however, provides neither a legal nor a policy basis for the Commission to cast aside rules that work as Congress intended. The Commission, of course, has no power to set aside Congress' explicit instructions. In Section 325(b) of the Communications Act, Congress specifically provided that "[n]o cable system or other [MVPD] shall retransmit the signal of a broadcast station . . . except . . . with the express authority of the originating station." This unambiguous statutory language leaves the Commission with no legal authority to interfere with the free market negotiations that take place as part of the retransmission consent regime.

Even as a matter of policy, there is no reason for the FCC to abandon its consistent conclusion that "local television broadcaster[s] and [MVPDs] negotiate in the context of a level playing field . . . ." Indeed, it is only because they face new competition that Petitioners apparently seek to avoid negotiating for compensation on fair terms and conditions. Perhaps

it goes without saying that the Petitioners would prefer to include broadcast stations in their channel line-ups without having to pay anything. The Commission, however, should reject the Petitioners' effort to mischaracterize competition as a threat from which MVPDs need government protection. Indeed, wholly apart from the quite remarkable assertion that highly-profitable MVPDs need "protection" from the fear of domination by broadcasters, the reality is that the *Petition* presents the Commission with no sound reason for intervening to "fix" a retransmission consent regime for which there is no evidence of anything broken, let alone evidence of consumer harm. Literally thousands of negotiations have been successfully concluded since 1992; it is only the exceptionally rare case in which a bargaining impasse has caused an MVPD to drop a broadcast station temporarily from the channel line-up. At the same time, broadcast stations and networks are confronting challenges to their own businesses, as competition in the video marketplace has given viewers access to vastly more choices for programming even as broadcasters' costs for marquee content also have been increasing.

Although the Commission lacks jurisdiction to interfere with free market retransmission consent negotiations, and to implement the Petitioners' improvident suggestions for reform, this does not mean that consumers are left powerless. During contentious negotiations, MVPDs suggest that viewers have no choices and risk being cut off from their favorite programming in the event of a retransmission consent bargaining impasse, but the modern marketplace offers consumers multiple alternative cable, satellite and telephone company video providers for obtaining their favorite broadcast programming in any given market, and they also can receive the programming over-the-air for free. The

Commission could explore ways to ensure that consumers have timely information about their right and ability to obtain desired programming from alternative sources.

In short, MVPDs do not need the government to tip the negotiating scales in their favor. Broadcast programming remains incredibly popular among consumers – and incredibly valuable to MVPDs, or else they simply would choose not to carry retransmission consent stations in their programming line-ups. Broadcasters invest enormous resources, and take immense financial risks, to create, produce and distribute this content. As Congress and the Commission have long recognized, MVPDs should pay fair compensation for this programming. Moreover, rigorous economic analyses have shown that the total cost for *all* MVPD content (of which broadcast retransmission consent is just a small fraction) is not a driving force behind retail rate increases.

Thus, no matter how hard they try to wrap themselves in the mantle of consumer welfare, the Petitioners, in reality, are simply seeking to avoid normal marketplace negotiations to arrive at a fair value for the right to carry the broadcast stations whose programming is far and away the most popular content they sell to their subscribers.

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COMMENTS OF THE BROADCAST NETWORKS

CBS Corporation, Fox Entertainment Group, Inc. and Fox Television Stations, Inc., NBC Universal, Inc. and NBC Telemundo License Co., The Walt Disney Company, and Univision Communications Inc. (collectively the "Broadcast Networks") hereby respectfully submit these initial views in response to the Commission's public notice seeking comment about the petition for rulemaking filed March 9, 2010 by several multichannel video programming distributors ("MVPDs") and their supporters (collectively, the "Petitioners").[1]

As demonstrated herein, the retransmission consent regime works, and flourishing competition has brought numerous benefits to broadcasters, MVPDs and consumers alike. Notwithstanding this competition, or more likely because of it, a handful of profitable cable, satellite and telephone company (telco) video providers have come forward to criticize a regulatory structure that in fact relies on fair and free market negotiations to ensure that broadcasters receive just compensation for their investments in creating and distributing what is indisputably some of the most compelling and popular programming on television. The Commission should reject the Petitioners' invitation to interfere with a

1 *See In re Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, DA 10-474 (filed Mar. 9, 2010) (the "*Petition*").

structure that not only works well, but which the FCC lacks authority to alter in the manner proposed by the *Petition*.

I. THE RETRANSMISSION CONSENT MARKETPLACE IS FUNCTIONING JUST AS CONGRESS ENVISIONED

A. As the FCC Consistently Has Concluded, Broadcasters and MVPDs Negotiate For Signal Carriage on an Even Playing Field

Section 325(b)(1) of the Communications Act, 47 U.S.C. § 325(b)(1), provides in pertinent part that "[n]o cable system or other [MVPD] shall retransmit the signal of a broadcasting station . . . except . . . with the express authority of the originating station." In passing this law, Congress emphasized that it intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals" but did not desire "to dictate the outcome of the ensuing marketplace negotiations."[2]

After nearly 20 years, the free market competition that Congress envisioned finally has come to fruition, as multiple competing MVPDs, including two Direct Broadcast Satellite providers (*e.g.*, DISH Network and DirecTV), cable over-builders and telco video providers (*e.g.*, Verizon FiOS and AT&T U-verse), vie for subscribers. Petitioners apparently are motivated by the fact that, as a result of free market negotiations, MVPDs may now find it necessary to pay monetary compensation to broadcasters, just as they do for the cable, satellite and telco video programming channels they distribute. Of course, it is the hallmark of a free market that a party may choose when and whether to enter into commercial relationships with other parties, to raise or lower its prices as governed by market conditions, and to walk away from a deal if it cannot reach agreement with its counterparty on mutually acceptable terms and

[2] S. Rep. 102-92 (1991), at 36.

conditions. This free market is just what Congress had in mind when it enacted Section 325.[3] It is the economic tension resulting from a more competitive video programming marketplace, however – and not any flaw in the retransmission consent regime – that has motivated MVPDs to reconsider their negotiating tactics.

Petitioners claim that reform of the retransmission consent process is required to somehow "fix" the video programming marketplace.[4] Contrary to the rhetoric in the *Petition*, the Petitioners' proposed reforms would not promote a free market for retransmission consent; they would destroy it. Indeed, the *Petition* would subvert the retransmission consent process by stripping away from broadcasters the only bargaining power they have in a negotiation: the twin rights to negotiate for fair compensation and to refuse consent to an MVPD's carriage in the absence of fair compensation – rights available to all other video programming networks.

At its core, the *Petition* asks the Commission to repeal the essential right that Congress granted to broadcasters in Section 325 of the Act. The FCC, of course, has no authority to set aside rights bestowed by Congress. Equally significant, the Commission itself consistently has found that the retransmission consent regime is working as Congress intended. In particular, less than five years ago, the Commission issued a report to Congress in which it decided "not . . . to recommend any changes to the

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3 *See, e.g., id.* at 35 ("Cable operators pay for the cable programming services they offer to their customers . . . [and] programming services which originate on a broadcast channel should not be treated differently.").

4 *Petition*, at 35.

retransmission consent regime . . . ."[5] The Commission noted that the retransmission consent process provides "incentives for both parties to come to mutually beneficial arrangements."[6] Moreover, the FCC has observed that both broadcasters and MVPDs:

> benefit when carriage is arranged – the station benefits from carriage because its programming and advertising will be carried as part of the MVPD's service, and the MVPD benefits because the station's programming makes the MVPD's offerings more appealing to consumers. Most importantly, consumers benefit by having access to such programming via an MVPD.[7]

Ultimately, the Commission reported to Congress that "local television broadcaster[s] and [MVPDs] negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side."[8] All the hype surrounding retransmission consent notwithstanding, the fact is that advertising remains the economic engine of broadcast television, and without distribution to the widest possible audience (including MVPD subscribers), the advertising engine would sputter to a halt. For these reasons, it should come as no surprise that literally thousands of retransmission consent negotiations have been concluded successfully since 1992, while bargaining impasses have caused MVPDs to drop broadcast stations only in exceptionally rare instances, and even then, only for brief periods of time.[9] In short, nothing has changed since the 2005 report. The

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5 Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, ¶ 35 (Sept. 8, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf.

6 *Id.* at ¶ 44 (internal citation omitted).

7 *Id.*

8 *Id.*

9 *See* Letter from Erin L. Dozier, Associate General Counsel, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC (dated May 6, 2010),

FCC has never found – nor could it – that there is an imbalance in bargaining between MVPDs and broadcasters.

B. Notice and Disclosure Could Protect Consumers Against Manufactured Crises

Although the Commission lacks jurisdiction to interfere with free market retransmission consent negotiations, and to implement the Petitioners' improvident suggestions for reform, this does not mean that consumers are left powerless. In contentious negotiations, MVPDs suggest that viewers have no choices and risk being cut off from their favorite programming in the event of a retransmission consent bargaining impasse, but the modern marketplace offers consumers multiple alternative cable, satellite and telco video providers for obtaining their favorite broadcast programming in any given market, and they also can receive the programming over-the-air. The Commission could explore ways to ensure that consumers have timely information about their right and ability to obtain desired programming from alternative sources.

At the end of the day, a private negotiation between a broadcaster and an MVPD need not put consumers in a position where they are at risk of losing channels at the last minute. Consumers have the right, and should have the opportunity, to take advantage of the many alternative choices available when one MVPD's behavior threatens the potential loss of popular content. Other than exploring ways to provide consumers with adequate information, however, there is no reason for the Commission to abandon its

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Attachment A, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon*, Jeffrey A. Eisenach and Kevin W. Caves, Navigant Economics ("*Eisenach Report*"), at 18-19 (analysis of all retransmission negotiation impasses from 2006 through April 2010 shows that consumers are more than *20 times* more likely to be deprived of television viewing by an electricity outage than by a bargaining impasse between broadcasters and MVPDs and aggregate service interruptions from retransmission consent negotiating impasses "represent approximately *one one-hundredth of one percent* of annual U.S. television viewing hours") (emphasis supplied).

sound conclusion that the retransmission consent regime is functioning as Congress intended.

II. CONGRESS DIRECTED THE COMMISSION TO RELY ON THE MARKETPLACE FOR RESOLUTION OF RETRANSMISSION CONSENT NEGOTIATIONS

Congress passed Section 325 of the Communications Act "to establish a marketplace for the disposition of the rights to retransmit broadcast signals . . . ."[10] In doing so, it expressed "the policy of the Congress in this Act to . . . rely on the marketplace, to the maximum extent feasible, to achieve" the "availability to the public of a diversity of views and information through cable television and other video distribution media."[11] Congress concluded that "a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals" and public policy should not support a system "under which broadcasters in effect subsidize the establishment of their chief competitors."[12] Thus, the legislative history emphasized that "it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations."[13] The Commission always should be cautious about dictating the outcome of marketplace negotiations, but it should be especially wary of interfering with marketplace rights that have been bestowed explicitly by Congress.

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10 S. Rep. No. 102-92, at 36.

11 H. Rep. No. 102-862 (1992), at 4.

12 S. Rep. No. 102-92, at 35.

13 *Id.* at 36.

A. The Commission Lacks Jurisdiction to Interfere With Free Market Negotiations Through Temporary Standstills, Interim Carriage Obligations or Mandatory Arbitration

By its plain terms, with respect to stations that elect retransmission consent, Section 325 of the Act precludes any cable system or other MVPD from "retransmit[ing] the signal of a broadcasting station . . . except . . . with the express authority of the originating station."[14] There is no ambiguity in this statute, and the Commission has no room to maneuver around its plain meaning to adopt rules that permit MVPD carriage of a broadcast station without the station's consent.[15] The Petitioners' argument that the Commission has jurisdiction to impose carriage mandates or binding arbitration therefore is entirely without merit.

The MVPDs cite to Section 325(b)(3)(A) of the Act,[16] but that provision merely directed the FCC to adopt rules implementing the statute within 180 days of enactment of the Cable Act. Even if the FCC were to conclude that Section 325(b)(3)(A) provides it with some type of enduring authority, the statutory provision required the FCC to "consider the impact that the grant of retransmission consent . . . may have on the *rates* for the basic service tier" charged to consumers.[17] The Commission could not rationally take action under this statute to ensure that *consumers* have access to reasonable *retail rates* unless it were to undertake an examination of *every single* component of basic tier charges. That would only lead down the road of intrusive cable rate re-regulation, which

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[14] 47 U.S.C. § 325(b)(1).

[15] *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (if a statute "has directly spoken to the precise question at issue," the agency "must give effect to the unambiguously expressed intent of Congress").

[16] *See Petition*, at 38.

[17] *See* 47 U.S.C. § 325(b)(3)(A).

would entail the FCC's flyspecking not only retransmission consent but other aspects of the basic tier, including prices charged to consumers for installation and the rental and/or purchase of MVPD equipment – an unpalatable outcome in an environment of abundant and effective competition. We doubt that Petitioners seek such a result.

In any event, Petitioners' reliance on Section 325(b)(3)(A) as a hook for authority to impose standstill or arbitration requirements is misplaced. First, the provision does not authorize the Commission to ignore the explicit prohibition on an MVPD's carriage of any broadcast signal without the originating station's "express" consent, as set forth in Section 325(b)(1)(A). Second, simply as an empirical matter, Petitioners vastly overstate the purported relationship between retransmission consent compensation and retail cable rates.

A number of rigorous economic analyses have shown that the retransmission consent process benefits consumers and that the total cost for *all* cable content (of which broadcast retransmission consent is itself just a small fraction) comprises just a small portion of retail rates and is not a driving force behind rate increases.[18] As Dr. Jeffrey Eisenach recently explained to the Commission, "the data simply do not support the claim that increases in MVPD rates are caused by rising programming costs in general, or

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[18] *See Eisenach Report*; *see also, e.g.,* Letter from Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC (dated May 5, 2010), at Attachment, *Video Programming Costs and Cable TV Prices*, Jeffrey A. Eisenach (Apr. 2010); *Wholesale Packaging of Video Programming*, Bruce M. Owen (Jan. 4, 2008) (submitted as part of MB Docket No. 07-198); *Retransmission Consent and Cable Television Prices*, Jeffrey A. Eisenach and Douglas A. Trueheart, Cap Analysis (Mar. 31, 2005) (submitted as part of MB Docket No. 05-28); *Response to Comments Regarding Economic Consequences of Retransmission Consent*, Michael G. Baumann and Kent W. Mikkelsen, Economists Incorporated (Mar. 31, 2005) (submitted as part of MB Docket No. 05-28); *Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules*, Bruce M. Owen, Michael G. Baumann and Kent W. Mikkelsen, Economists Incorporated (Apr. 21, 2003) (submitted as part of MB Docket No. 02-277).

rising retransmission fees in particular."[19] In fact, "[t]o the contrary, programming costs are rising slower than MVPD revenues, slower than other components of MVPD costs, and slower than MVPD profits . . . ."[20] Moreover, "retransmission fees make up a small fraction of programming costs, and an even smaller percentage of MVPD revenues."[21] In particular, Dr. Eisenach found that, with respect to six major cable operators, for each dollar of increase in programming expenses between 2003 and 2008, cable operators raised total charges by nearly $4.[22] Thus, "while rates for certain types of MVPD services – such as cable television prices – are undeniably on the rise, it makes little sense to blame this trend on programming costs, and even less to single out retransmission fees."[23]

The Petitioners' citations to various categories of the FCC's ancillary authority are equally unavailing.[24] As the D.C. Circuit recently made abundantly clear, the Commission's ability to rely on ancillary authority is limited; it can invoke ancillary jurisdiction only to take an action reasonably linked to an express grant of statutory authority.[25] Furthermore, as the *Petition* itself acknowledges,[26] Sections 4(i) and 303(r) of

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19 *Eisenach Report*, at 21.

20 *Id.*

21 *Id.*

22 *See id.* at 22.

23 *Id.*

24 *See Petition*, at 38-39.

25 *See Comcast Corp. v. FCC*, 600 F. 3d 642, 653 (2010) ("ancillary authority is really incidental to, and contingent upon, *specifically delegated powers under the Act*") (internal citation omitted) (emphasis in original); *see also id.* at 661 (reversing the Commission for attempting to exercise an "expansive theory of ancillary authority").

26 *See Petition*, at 38.

the Act permit ancillary regulation only when a Commission action would not be "inconsistent" with the Act.[27] Quite clearly, neither a mandatory standstill nor binding arbitration can be considered reasonably ancillary to any express provision in the Act. More important, both of the Petitioners' proposals – which contemplate MVPD carriage of broadcast signals without an originating station's consent, or on terms and conditions to which the originating station has not agreed – would directly contravene Section 325(b)(1) of the Act.

The terms of Section 325(b)(1) place broadcast content in a fundamentally different legal position than subscription channels, for which the Commission recently adopted standstill/interim carriage rules on the basis of ancillary authority.[28] As part of the *Program Access Order*, the FCC found that no express statutory guidance conflicted with its use of ancillary authority. Quite clearly, that is not the case when it comes to retransmission consent for broadcast signals. Incidentally, cable operators opposed the Commission's use of ancillary jurisdiction in the *Program Access* proceeding when their own channels were exposed to a standstill requirement, yet they apparently have no compunction in asserting the exact opposite position here. Having previously argued to the Commission that there is no policy or legal basis for the imposition of a standstill obligation in connection with program access disputes, cable operators should not be heard to endorse a standstill requirement for broadcast programming.

In short, the Commission has no jurisdiction to adopt the reforms proposed in the *Petition*, and Petitioners have offered no persuasive evidence to the contrary. Section

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[27] *See* 47 U.S.C. §§ 154(i), 303(r).

[28] *See In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746 (2010) (the "*Program Access Order*").

325 of the Act unambiguously prohibits MVPDs from carrying a broadcast signal without the originating station's consent. The statute precludes the proposed standstill obligation, which would permit an MVPD to retransmit a broadcast signal even in the absence of a retransmission consent agreement, just as much as it bars compulsory arbitration, which would substitute an arbitrator's dictates for the outcome of the private negotiations envisioned by Congress.[29] In either case, the Petitioners are asking that an MVPD be permitted to carry a broadcast signal without the station's consent – relief that the Commission cannot lawfully provide.

B. Broadcasters Have a First Amendment Right to Determine the Manner in Which They Distribute Their Programming

Putting aside the FCC's lack of jurisdiction to implement the Petitioners' proposed overhaul of retransmission consent, the imposition of a temporary standstill or interim carriage obligation also would violate broadcasters' First Amendment rights. As the Supreme Court has made clear, video programming networks "engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[30] All video programming channels, just like newspapers or magazines, have First Amendment rights to speak and to distribute their content as they see fit.[31] Any FCC decision that interferes with broadcasters' right to control their speech

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[29] To be clear, the MVPDs' request for arbitration involves far more than determining a fair market price for broadcast programming; retransmission consent negotiations also typically address such sensitive business issues as video-on-demand content, channel positioning and carriage of multicast streams, among other things.

[30] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).

[31] *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."); *see also Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (subjecting regulation of loudspeaker volume to First Amendment review).

would be subject to heightened constitutional scrutiny. Given the abundance of competition in the video programming marketplace, the Commission could not possibly justify a regulation of speech as narrowly tailored in furtherance of an important governmental objective.[32]

A regulation that compels programmers to speak when they would choose otherwise poses a First Amendment issue because "[t]hat kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. For corporations as for individuals, the choice to speak includes within it the choice of what not to say."[33] Indeed, the right of a First Amendment-protected speaker not to speak "serves the same ultimate end as freedom of speech in its affirmative aspect."[34] There is no basis for treating broadcasters in a disparate manner from any other video programming network in the context of the right to choose whether and how to speak.

Furthermore, in a recent case before the D.C. Circuit, MVPDs themselves argued that a ban on exclusive contracts violated their First Amendment rights by compelling them to speak against their will.[35] Now, when it is broadcast content at stake, the MVPDs' own articulation of First Amendment principles should govern here as well.

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32 *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

33 *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (internal citations omitted); s*ee also Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010).

34 *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (internal citation omitted).

35 *See Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1311-12, 1316-19 (D.C. Cir. 2010).

III. MVPDS BENEFIT TREMENDOUSLY FROM BROADCASTERS' INVESTMENTS IN COMPELLING CONTENT AND SHOULD NOT BE PERMITTED TO USE THE FCC TO GAIN LEVERAGE TO AVOID NEGOTIATING FOR FAIR COMPENSATION

A. The FCC Should Not Entertain Operators' Complaints About Having to Pay Fair Market Value for the Most Popular Programming Carried on Their Systems

Petitioners' arguments are self-contradictory. On the one hand, the MVPDs ask for government intervention because they claim that broadcast programming is so important to their channel line-ups that they would suffer competitive harm without it. On the other hand, the entire *Petition* is motivated by the MVPDs' reluctance at the bargaining table to pay fair market compensation for this valuable content. The Commission should not permit the MVPDs to have it both ways – either broadcast content really is valuable programming, in which case it deserves just compensation, or, if they feel retransmission consent stations are unworthy of fair payment, MVPDs should elect not to carry them. Of course, MVPDs ascribe great value to broadcast programming precisely because their own subscribers want access via the MVPD channel line-up to some of the most popular programming on television. Indeed, because broadcast programming remains incredibly popular among consumers, MVPDs reap tremendous benefits by carrying broadcast stations on their systems.[36]

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[36] The cable industry was founded as a business designed to make popular broadcast programming more accessible to consumers. DirecTV and DISH Network fought for years to gain the right to distribute local broadcast signals. Local-into-local was their number one priority for a reason – they knew that access to popular broadcast content was essential to their ability to compete. The Commission, for example, found that "significant increase[s]" in DBS subscribership can be attributed to the "authority granted to DBS providers . . . to offer 'local-into-local' service." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, 6038 (2001) (citing study finding a 43 percent increase in new subscriber additions for DBS providers in markets where they began to retransmit local broadcast signals).

Moreover, cable, satellite and telco video distributors are highly profitable enterprises. Time Warner Cable just reported that its most recent quarterly earnings increased 30 percent on revenues of $4.6 billion.[37] DirecTV, meanwhile, saw its quarterly revenues soar to $5.6 billion, which generated more than $500 million in net income.[38] Cablevision reported a tripling of its quarterly profit, with revenue of nearly $2 billion and $240 million in free cash flow.[39] And Insight detailed that its revenues jumped by 10 percent in the most recent quarter, compared to the prior year, generating $40 million in free cash flow.[40]

These examples reveal that MVPDs are healthy businesses; they appear motivated to seek the aid of government here so as to avoid having to share those profits equitably with the very creators of the content that has helped make MVPDs so successful. It is a fundamental tenet of a competitive marketplace, however, that as costs rise, profit margins may shrink. This is certainly true of broadcast stations and networks, which like all businesses have had to deal with the impact to their bottom lines as competition in the video marketplace has given viewers access to vastly more choices for programming, even as broadcasters' costs for marquee programming also have been increasing. Petitioners present no basis whatsoever to support their position that MVPDs should be

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37 *See* D. Yao, *Time Warner Cable first-quarter profit rises, shares climb*, THE OAKLAND PRESS, Apr. 29, 2010, http://www.theoaklandpress.com/articles/2010/04/29/business/doc4bd9db906b65d-507224758.txt.

38 *See* K. Riddell, *DirecTV Profit Beasts Estimates on Premium Services (Update2)*, BLOOMBERG BUSINESSWEEK, May 6, 2010, http://www.businessweek.com/news/2010-05-06/directv-profit-beats-estimates-on-premium-services-update2-.html.

39 N. Worden & D. Benoit, *Cablevision Profit More Than Triples*, THE WALL STREET JOURNAL, May 6, 2010, http://online.wsj.com/article/SB10001424052748704370704575228052-080463886.html.

40 Business Wire, *Insight Announces First Quarter 2010 Results*, May 10, 2010, Yahoo! Finance, http://finance.yahoo.com/news/Insight-Announces-First-bw-2937754880.html?x=0&.v=1.

insulated from normal market forces. The fact that competition has emerged to the point where MVPDs have to compete for consumers on pricing should be a testament to Congress' vision for a competitive marketplace, not a criticism of retransmission consent.

B. Carriage Negotiations Foster Competition and Generate Benefits for Consumers, Broadcasters and MVPDs Alike

While the Petitioners have attempted to portray themselves as acting under the auspices of the public interest, the stark reality is that the future of over-the-air television depends on the broadcast business model developing a second stream of revenue. Thus, the true public interest lies in preserving the marketplace that Congress created to ensure the future viability of free broadcast television. Broadcasting traditionally has been a medium supported solely by advertising, while cable, satellite and telco video networks receive revenue from both advertising and per-subscriber license fees. If free, over-the-air television is to remain the home of compelling programming, broadcasters must be allowed to seek marketplace payments for their programming as they seek to remain competitive.

There is ample economic evidence that consumers are the real beneficiaries of the market forces that Congress wisely unleashed. For example, as Economists Inc. has explained, the "opportunity to be compensated for retransmission consent should increase [broadcasters'] incentives to provide attractive programming."[41] These increased incentives are manifested in the improved quality of local programming that a broadcast

[41] *See Response to Comments Regarding Economic Consequences of Retransmission Consent*, Michael G. Baumann and Kent W. Mikkelsen, Economists Incorporated (Mar. 31, 2005) (submitted as part of MB Docket No. 05-28), at 12.

station can produce as well as the higher quality national programming that a station can acquire. Consumers, as a result, receive better and more appealing content.

In addition, contrary to the Petitioners' claim that broadcast stations exercise "market power" in retransmission consent negotiations, expert economic analyses have confirmed that the mere fact broadcasters distribute high-quality programming does not give them undue leverage (especially given the *hundreds* of channels of non-broadcast programming that MVPDs carry).[42] As Dr. Eisenach explained, "the first thing economists look for in judging prices is existence of market power or other forms of market failure."[43] Given that "there is virtually no evidence of market power on behalf of programmers," Dr. Eisenach concluded that "cable operators' claims that programming prices are 'too high' do not square with the underlying structure of the marketplace."[44]

Another way to examine pricing questions is to review the role that MVPDs' programming expenses have played over time and compare these costs with operators' other costs and their profits. Put simply, Dr. Eisenach found cable operators' claims of harm "unjustified," since programming costs "are not rising relative to cable operators' revenues, profits or other costs."[45] As noted above, total cable operator revenues are increasing at a much faster pace than programming costs, and so, in turn, are cable profits.[46] In other words, relative to the pertinent financial metrics, cable operators' costs

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[42] *See, e.g.*, Letter from Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC (dated May 5, 2010), Attachment, *Video Programming Costs and Cable TV Prices*, Jeffrey A. Eisenach (Apr. 2010), at 3.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 4.

[46] *See supra*, Section II.A.

attributable to programming are actually *declining*. And because costs attributable to retransmission consent constitute just a fraction of overall programming costs, it is simply illogical for Petitioners to posit that retransmission consent compensation plays any meaningful role in rising retail rates.

Indeed, if broadcasters had “market power,” it would not have taken nearly 20 years to begin to achieve even a small measure of fair compensation; in fact, however, MVPDs refused for years to pay anything for the right to retransmit broadcast stations. Just because they are facing increased competition, and having to bargain on more equitable terms, does not mean that MVPDs deserve government protection from having to negotiate in the free market that Congress established.

IV. CONCLUSION

In sum, the retransmission consent marketplace is functioning well, just as Congress intended, and there is no basis in law or policy for the regulatory intervention that Petitioners seek. The Commission promptly should dismiss the *Petition* and terminate this proceeding.

Respectfully submitted,

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